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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALOYSIUS McELROY,

Defendant and Appellant.

A124026

(Contra Costa County
Super. Ct. No. 050807016)

Appellant Aloysius McElroy appeals from the judgment entered after his petty theft and second degree commercial burglary convictions. His counsel raises no issues and asks this court for an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436.

BACKGROUND

On May 17, 2008, appellant shoplifted 11 packs of batteries from the Target store in Walnut Creek, California. He was held under citizen's arrest by Target Security Manager Nathaniel Moore, and subsequently taken into custody by Officer Kim Gerstner of the Walnut Creek Police Department and charged with petty theft and burglary. (Pen. Code, §§ 484, 488, 459, 460, subd. (b).)

The case proceeded to a jury trial following in limine motions. The court admitted into evidence two prior convictions also involving battery theft from a Target store in San Bruno in 2005 and 2006. The court stated that the prior convictions were probative of appellant's intent, because the conduct resulting in the convictions was virtually identical to the case at bar. The court gave limiting instructions regarding the prior convictions at

the time the evidence was presented and again during the general jury instructions. The court had already bifurcated the issue of the prior convictions alleged in the complaint, so that they would not be read to the jury during the initial portion of trial. Finally, the court admitted a statement in which appellant stated to police that he had planned to steal a certain number of batteries in order to sell them to raise \$30.

Four other prior convictions, all resulting from appellant lifting items from Target and Safeway stores, were not admitted because the trial court found them to be too prejudicial. The court also did not admit evidence of appellant's assaultive conduct against the same Target security manager, Nathaniel Moore, on a prior occasion.

The jury found appellant guilty of one count of petty theft and one count of second degree commercial burglary. (Pen. Code, §§ 484, 488, 459, 460, subd. (b).) At his sentencing hearing, appellant waived his statutory right to jail time credits of 245 days plus 122 days for good time, or 367 days total. The court ordered appellant to serve 365 days in county jail, where he would be entitled to receive day-to-day credits for time spent in a residential treatment program for his cocaine dependence.

Appellant filed this timely appeal.

DISCUSSION

During the course of the trial, appellant was led in handcuffs through a courthouse hallway where he was apparently seen by some jurors. The court denied appellant's motion for mistrial, noting that the design of the courthouse made it impossible to transport prisoners within the building without the possibility of interaction with jurors. The trial judge offered to give an instruction patterned on CALCRIM No. 204, directing the jury to disregard any evidence of appellant's custodial status. Defense counsel declined the offer because it would only "highlight the fact that he is in custody."

The California Supreme Court recently discussed the trial court's exercise of discretion in maintaining courtroom security. (*People v. Stevens* (2009) 47 Cal.4th 625, 632.) The Supreme Court reiterated that "a criminal defendant may not appear before the jury in shackles, unless . . . the restraints are justified by a state interest[,] specific to the particular trial." (*Id.* at p. 633 [police deputy's presence by violent defendant at witness

stand did not prejudice defendant].) The record must demonstrate actual violence, a threat of violence, or nonconforming conduct to justify the physical restraints; the use of restraints offends a defendant's dignity and convey to the jury that the defendant is "especially dangerous or culpable." (*Id.* at pp. 632, 643-644.) This record does not suggest that appellant posed a threat of violence. Indeed, the trial court candidly pointed to inadequate courthouse facilities to excuse the potentially prejudicial error of mingling of defendants with jurors.

It cannot be disputed that many California court buildings are inadequate. Many court structures suffer from shortcomings in design and construction, overcrowding, deferred maintenance, inadequate seismic reinforcement, and a myriad of other flaws. However, we need not reach the issue of whether such rickety infrastructure might mean that routine encounters between shackled defendants and the jurors who hear their cases "are justified by a state interest[,] specific to the particular trial." (*People v. Stevens*, *supra*, 47 Cal.4th at p. 633).

The error was harmless in this case because the evidence against appellant was overwhelming and undisputed. Appellant has a history of prior convictions, but the court admitted only those based on conduct nearly identical to these charged offenses. The court refused to admit tangential evidence of assaultive conduct against a witness, as well as four other convictions of less probative significance and more prejudicial effect. Even without the evidence of the two prior convictions based on similar conduct, the evidence supporting the charges was solid: Moore testified that he observed the appellant select batteries, conceal them in his pants, and leave the store without purchasing the items. Appellant admitted that he had a plan to steal batteries to raise \$30. Officer Gerstner identified both appellant and the batteries that Moore recovered at the time of appellant's arrest.

Under either the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability]) or the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18, 24 [beyond a reasonable doubt]), the absence of the error would not have led to a

more favorable result. The error in permitting appellant to be seen in shackles by some of the jurors was harmless and the motion for mistrial was properly denied. Appellant was notified of his right to file a supplemental brief on his own behalf but has not filed one.

DISPOSITION

Our independent review of the record reveals no arguable issues other than the exposure of appellant's custodial status to the jury, discussed above. The judgment is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.